

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DOUGLAS J. RIHA,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

NO. C13-2181-JLR-JPD

REPORT AND
RECOMMENDATION

Plaintiff Douglas J. Riha appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be reversed and remanded for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

At the time of the administrative hearing, plaintiff was a 49 year- old man with a high school education. Administrative Record (“AR”) at 21. His past work experience includes employment as a warehouse worker, delivery driver and as a return clerk. *Id.* Plaintiff was last gainfully employed in October 2009. AR at 13.

1 On November 18, 2010, plaintiff filed a claim for SSI payments and an application for
2 DIB, alleging an onset date of October 9, 2009. AR at 11. Plaintiff asserts that he is disabled
3 due to major depressive disorder, generalized anxiety disorder, personality disorder, panic
4 disorder, PTSD, left knee status post ACL repair, arthralgia of the left knee, paroxysmal atrial
5 fibrillation with dyspnea, psoriasis, arthritis, lumbar degenerative disc disease, and obesity.
6 AR at 13.

7 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 11.
8 Plaintiff requested a hearing which took place on October 24, 2012. AR at 29-60. On
9 October 30, 2012, the ALJ issued a decision finding plaintiff not disabled and denied benefits
10 based on his finding that plaintiff could perform a specific job existing in significant numbers
11 in the national economy. AR at 11-23. Plaintiff's administrative appeal of the ALJ's
12 decision was denied by the Appeals Council, AR at 1-5, making the ALJ's ruling the "final
13 decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). Plaintiff timely
14 filed the present action challenging the Commissioner's decision. Dkt. 3.

15 II. JURISDICTION

16 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
17 405(g) and 1383(c)(3).

18 III. STANDARD OF REVIEW

19 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
20 social security benefits when the ALJ's findings are based on legal error or not supported by
21 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
22 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
23 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
24 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750

(9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The Court may find that this occurs when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that erroneously rejected evidence may be credited when all three elements are met).

IV. EVALUATING DISABILITY

As the claimant, Mr. Riha bears the burden of proving that he is disabled within the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are of such severity that he is unable to do his previous work, and cannot, considering his age,

1 education, and work experience, engage in any other substantial gainful activity existing in the
2 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
3 99 (9th Cir. 1999).

4 The Commissioner has established a five step sequential evaluation process for
5 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
6 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
7 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
8 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
9 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
10 §§ 404.1520(b), 416.920(b).¹ If he is, disability benefits are denied. If he is not, the
11 Commissioner proceeds to step two. At step two, the claimant must establish that he has one
12 or more medically severe impairments, or combination of impairments, that limit his physical
13 or mental ability to do basic work activities. If the claimant does not have such impairments,
14 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
15 impairment, the Commissioner moves to step three to determine whether the impairment meets
16 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
17 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
18 twelve-month duration requirement is disabled. *Id.*

19 When the claimant’s impairment neither meets nor equals one of the impairments listed
20 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
21 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
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23 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

Commissioner evaluates the physical and mental demands of the claimant's past relevant work to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show that the claimant can perform other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

V. DECISION BELOW

On October 30, 2012, the ALJ issued a decision finding the following:

1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2014.
2. The claimant has not engaged in substantial gainful activity since October 9, 2009, the alleged onset date.
3. The claimant has the following severe impairments: major depressive disorder, generalized anxiety disorder, personality disorder, panic disorder, post-traumatic stress disorder, left knee status post ACL repair, arthralgia of the left knee, paroxysmal atrial fibrillation with dyspnea, psoriasis, arthritis, lumbar degenerative disc disease, and obesity.
4. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) that does not require standing or walking for more than four hours through the day; that does not require more than frequent climbing of ramps or stairs; that does not require more than occasional stooping, kneeling, crouching, crawling, or climbing of ladders, ropes or scaffolds; that does not require concentrated exposure to vibrations or hazards such as unprotected heights or open machinery; that does not require exposure to pulmonary irritants; and that is low stress, meaning it is

simple, routine, and does not require interaction with coworkers or the general public.

6. The claimant is unable to perform any past relevant work.

7. The claimant was born on XXXXX, 1963 and was 46 years old, which is defined as a younger individual age 18-49, on the alleged disability onset date.²

8. The claimant has at least a high school education and is able to communicate in English.

9. Transferability of job skills is not material to the determination of disability because using the Medical-Vocational Rules as a framework supports a finding that the claimant is “not disabled,” whether or not the claimant has transferable job skills.

10. Considering the claimant’s age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform.

11. The claimant has not been under a disability, as defined in the Social Security Act, from October 9, 2009, through the date of this decision.

AR at 13-23.

VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. The ALJ failed to properly consider the opinion of Ralph Havens, M.D.
2. The ALJ failed to properly consider the opinion of David Widlan, Ph.D.
3. The ALJ erred in rejecting the opinion of David Moore, Ph.D.
4. The ALJ erred in rejecting the opinion of Richard Washburn, Ph.D.

Dkt. 15 at 1.

VII. DISCUSSION

A. Standards for Reviewing Medical Evidence

As a matter of law, more weight is given to a treating physician’s opinion than to that of a non-treating physician because a treating physician “is employed to cure and has a greater

² The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

1 opportunity to know and observe the patient as an individual.” *Magallanes v. Bowen*, 881 F.2d
2 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating
3 physician’s opinion, however, is not necessarily conclusive as to either a physical condition or
4 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.
5 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining
6 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not
7 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,
8 157 F.3d 715, 725 (9th Cir. 1988). “This can be done by setting out a detailed and thorough
9 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
10 making findings.” *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than
11 merely state his/her conclusions. “He must set forth his own interpretations and explain why
12 they, rather than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22
13 (9th Cir. 1988)). Such conclusions must at all times be supported by substantial evidence.
14 *Reddick*, 157 F.3d at 725.

15 The opinions of examining physicians are to be given more weight than non-examining
16 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the
17 uncontradicted opinions of examining physicians may not be rejected without clear and
18 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
19 physician only by providing specific and legitimate reasons that are supported by the record.
20 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

21 Opinions from non-examining medical sources are to be given less weight than treating
22 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
23 opinions from such sources and may not simply ignore them. In other words, an ALJ must
24 evaluate the opinion of a non-examining source and explain the weight given to it. Social

1 Security Ruling (“SSR”) 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives
2 more weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a
3 non-examining doctor’s opinion may nonetheless constitute substantial evidence if it is
4 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,
5 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

6 Plaintiff argues the ALJ violated these standards in assessing the opinions of Ralph
7 Havens, M.D., David Widlan, Ph.D., David Moore, Ph.D, and Richard Washburn, Ph.D.

8 B. Dr. Havens

9 On February 7, 2012, Dr. Havens examined plaintiff. AR at 482-85, 520-22. He
10 observed that plaintiff was uncomfortable throughout the examination, shifting weight, and
11 moving slowly from chair to table, and had an antalgic gait. He assessed plaintiff as presenting
12 with back pain, knee pain, homelessness, with a loss of fine motor control and dust sensitivity. AR
13 at 522. Dr. Havens also prepared a DSHS exertional summary and a range of motion (“ROM”)
14 report. AR at 482-85. Dr. Havens indicated plaintiff could carry a maximum of 20 pounds and
15 was restricted to carrying 10 pounds frequently. *Id.*

16 The ALJ purported to give “significant weight” to Dr. Havens’ report. AR at 19.
17 Plaintiff argues that the ALJ did not give significant weight to Dr. Havens’ report, but only a
18 portion of it, namely lifting restrictions, and ignored other portions of the report, and in
19 particular the ROM restrictions. The ROM evaluation indicated plaintiff had restrictions,
20 particularly in his upper body and neck region. AR at 484. Plaintiff also argues the ALJ erred
21 by failing to address other comments made by Dr. Havens to the effect that plaintiff advised
22 Dr. Havens that he was only able to sit for 15 minutes and stand for 10 minutes and had a hard
23 time tying his shoes and an increased rate of dropping things. Dkt. 15 at 3.

1 The Commissioner posits that the ALJ adopted the lift and carry limitations, but not the
2 other limitations that relied upon plaintiff's presentation, self-report, or testing within
3 plaintiff's control. Dkt. 16 at 6. This is appropriate, according to the Commissioner, because
4 the ALJ found the plaintiff to lack credibility. *Id.*

5 The Commissioner's argument fails for two reasons. First, the ALJ assigned
6 "significant weight" to Dr. Havens' report. The ALJ did not suggest that certain portions could
7 be ignored because Dr. Havens must be relying on less than credible comments by the plaintiff.
8 Thus, to suggest in its brief that the real reason for not adopting restrictions was for an unstated
9 reason falls afoul of the prohibition on using *post hoc* rationalizations that "attempt to intuit
10 what the adjudicator may have been thinking." *Bray v. Comm'r. of Soc. Sec. Admin.*, 554 F.3d
11 1219, 1225 (9th Cir. 2009). Second, even if the additional limitations as to what plaintiff said
12 are appropriately rejected due to adverse credibility issues, these would not apply to the
13 doctor's conduct of the ROM testing, absent any indication by the doctor that plaintiff was
14 manipulating the test. The ALJ simply ignored the results of the ROM testing and the doctor's
15 finding regarding plaintiff's loss of fine motor control.

16 C. Dr. Widlan

17 On February 28, 2011, Dr. Widlan performed a psychological evaluation of plaintiff.
18 AR at 412-16. Dr. Widlan diagnosed plaintiff with major depressive disorder with vague
19 psychotic features, generalized anxiety disorder with elements of panic and PTSD, attention-
20 deficit/hyperactivity disorder, and personality disorder, NOS. He assigned a Global
21 Assessment of Functioning ("GAF")³ score of 44. He concluded:

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23 ³ The GAF score is a subjective determination based on a scale of 1 to 100 of "the
24 clinician's judgment of the individual's overall level of functioning." AMERICAN PSYCHIATRIC
ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32-34 (4th ed. 2000).
A GAF score falls within a particular 10-point range if either the symptom severity or the level

1 Douglas suffers severe symptoms of depression as well as characterological
2 dysfunction and considerable anxiety with elements of panic and PTSD. The
3 Mental Status Examination indicated adequate concentration with some deficits
4 in memory and social reasoning. In terms of memory he exhibited moderate
5 impairment at most on MSE tasks. In terms of social reasoning he reported a
6 long history of difficulty getting along with others. He has struggled to sustain
7 employment because of this. He was able to work for one extended period in a
8 warehouse because he was the only employee in the warehouse. He is
cognitively able to accept instruction from a supervisor for simple, repetitive
tasks or moderately complex exercises. He appears to have chronic adaptive
deficits. He has a history of hitting himself and pulling his hair out, thought this
has ceased. He tends to pick at his skin and also experiences periods of
derealization. He would likely be easily overwhelmed with employment
stressors both in terms of employee relations as well as sustaining attention with
adequate pace and persistence.

9 AR at 416. The ALJ also purported to give significant weight to the opinion of Dr. Widlan,
10 noting:

11 Although the claimant presented with considerable anxiety, he was able to
12 complete mental status examination tasks and presented with adequate
13 intelligence. Dr. Widlan further noted that the claimant was able to make goal-
14 directed statements, had no difficulty following the clinical interview, and made
15 no tangential or circumstantial comments. Overall, Dr. Widlan determined that
16 the claimant was able to sustain concentration during the mental status
17 examination, and noted that the claimant was able to complete a simple three-
18 step task. Notably, the claimant told Dr. Widlan he could concentrate while
playing computer games, but not while watching a movie. Dr. Widlan opined
that the claimant is cognitively able to accept instruction from a supervisor for
simple, repetitive tasks or moderately complex exercises. Dr. Widlan expressed
concern about the potential for the claimant to become overwhelmed in the
workplace in terms of employee relations and sustaining attention. However,
these concerns are addressed by the residual functional capacity in limiting the

19 of functioning falls within the range. *Id.* at 32. For example, a GAF score of 51-60 indicates
20 “moderate symptoms,” such as a flat affect or occasional panic attacks, or “moderate difficulty
21 in social or occupational functioning.” *Id.* at 34. A GAF score of 41-50 indicates “[s]erious
22 symptoms,” such as suicidal ideation or severe obsessional rituals, or “any serious impairment
23 in social, occupational, or school functioning,” such as the lack of friends and/or the inability
24 to keep a job. *Id.* A GAF score of 31-40 indicates “some impairment in reality testing and
communication” or “major impairment in several areas, such as work or school, family
relations, judgment, thinking or mood.” A GAF score of 21-30 indicates “behavior is
considerably influenced by delusions or hallucinations” or “serious impairment in
communications or judgment” or “inability to function in all areas.” *Id.*

1 claimant to simple routine tasks and minimal contact with co-workers and the
2 public.

3 AR at 19-20.

4 Plaintiff argues that once again, although purporting to give Dr. Widlan's opinions
5 significant weight, the ALJ actually ignored important limitations. Again, perhaps recognizing
6 the error made by the ALJ, the Commissioner argues that plaintiff lacked credibility, and
7 therefore the ALJ did not have to credit opinions of Dr. Widlan, arguably supported by
8 plaintiff's comments to the doctor. Again, however, the ALJ attributed great weight to the
9 doctor's opinion, and simply suggested that the RFC limitation of restricting plaintiff to simple
10 work would satisfy the concerns raised by Dr. Widlan. However, Dr. Widlan opined that
11 plaintiff would likely be "overwhelmed with employment stressors" not only involving
12 employee relations, but also with "sustaining attention with adequate pace and persistence."
13 AR at 416. The RFC adopted by the ALJ says nothing about pace and persistence restrictions
14 and is hardly consistent with providing significant weight to Dr. Widlan's opinions.

15 D. Dr. Moore

16 Dr. Moore performed a psychological examination of plaintiff on August 10, 2010, and
17 prepared a DSHS psychological evaluation report. AR at 325-32. Dr. Moore diagnosed
18 plaintiff with anxiety disorder from historical trauma, less than PTSD; major depressive
19 disorder, recurrent; attention deficit hyperactivity disorder, mild; and a combination of
20 dependent and depressed personality symptoms. AR at 327. During his evaluation, he
21 observed marked symptoms of depressed mood, anxious or fearful state, angry or aggressive
22 state, marked to moderate symptoms of social withdrawal, and moderate problems with
23 attention and focus. AR at 326. He assigned a GAF score of 49. AR at 327.

24 The ALJ assigned "some weight" to the opinion of Dr. Moore, stating:

1 Overall, based on the claimant's performance on the mental status examination,
2 he assessed that the claimant was mildly to moderately impaired in his cognitive
3 and social functioning, but assessed the claimant as markedly impaired in his
4 ability to interact appropriately in public contacts. These findings are somewhat
5 inconsistent with Dr. Moore's assessment that the claimant's psychological
6 symptoms would have a moderate to marked effect on his ability to perform
7 work-related activities. His opinion regarding the severity of claimant's
8 symptoms appears to be largely based upon claimant's self-report of symptoms
9 which, as noted above, the undersigned has found to be not wholly credible.

10 AR at 20. The reasons proffered by the ALJ to discount the negative assessments of plaintiff
11 in Dr. Moore's report are neither specific nor legitimate. First, the alleged "inconsistencies"
12 are not apparent at all. If, indeed, the ALJ believes there are internal inconsistencies, these
13 should be pointed out. Second, to suggest that plaintiff's self-reports are the primary basis for
14 the negative assessments is to ignore the work done by a psychologist in particular, and all
15 doctors in general. Moreover, the generalized comment by the ALJ ignores the very specific
16 observations by Dr. Moore noted in the report. See AR at 326.

17 E. Dr. Washburn

18 Dr. Washburn completed a psychological examination of plaintiff on February 14,
19 2011. AR at 405-09. Dr. Washburn diagnosed plaintiff with depressive disorder, recurrent;
20 generalized anxiety disorder with symptoms of PTSD; panic disorder with mild agoraphobia;
21 and personality disorder, NOS, with dependent features. He assigned a GAF score of 45. Dr.
22 Washburn found plaintiff had severe limitations in his abilities to communicate and perform
23 effectively in a work setting with public contact; to communicate and perform effectively in a
24 work setting with limited public contact; and to maintain appropriate behavior in a work setting.
AR at 409.

The ALJ assigned "little weight" to Dr. Washburn's opinions, as he found them to be
"inconsistent with the claimant's demonstrated abilities, as discussed above, and appears to be
largely based upon claimant's self-report. Furthermore, his opinions are inconsistent with

1 claimant's performance on the mental status examination, in which the claimant was generally
2 assessed as adequate." AR at 20.

3 The "demonstrated abilities" that the ALJ refers to are not clear. It is possible that the
4 term "demonstrate abilities" refers to plaintiff's abilities to perform a mental status exam, ride
5 on a bus, live with his niece, play on-line video games and go to the library. If this is, in fact,
6 an accurate summary of the plaintiff's "demonstrated abilities" to which the ALJ refers, the
7 alleged "inconsistencies" are not facially apparent. It appears that the ALJ is substituting
8 boilerplate language for the specific and legitimate reasons that are required by *Orn* to discount
9 the opinions of an examining physician.

10 The errors in the treatment of the medical evidence require a remand. On remand, the
11 ALJ is also reminded that the opinions of treating and examining physicians are generally
12 accorded more weight than those of non-examining reviewing physicians. *See* discussion
13 regarding standards for evaluating medical evidence above.

14 VIII. CONCLUSION

15 For the foregoing reasons, the Court recommends that this case be REVERSED and
16 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's
17 instructions. A proposed order accompanies this Report and Recommendation.

18 Objections to this Report and Recommendation, if any, should be filed with the Clerk
19 and served upon all parties to this suit by no later than **September 12, 2014**. Failure to file
20 objections within the specified time may affect your right to appeal. Objections should be
21 noted for consideration on the District Judge's motion calendar for the third Friday after they

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1 are filed. Responses to objections may be filed within **fourteen (14)** days after service of
2 objections. If no timely objections are filed, the matter will be ready for consideration by the
3 District Judge on **September 19, 2014**.

4 DATED this 29th day of August, 2014.

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JAMES P. DONOHUE
7 United States Magistrate Judge
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